for access to its rights-of-way where capacity is insufficient to accommodate the request. Historically, the exercise of rights of eminent domain has been beyond the scope of the FCC's jurisdiction.[14/] The historical treatment was not changed by the 1996 Act. Congress must be presumed knowledgeable about existing law relevant to the legislation it enacts.[15/] Moreover, unlike Section 541(a)(2) of the 1984 Cable Act, to which Continental Cablevision et al. refer, the Pole Attachments Act of 1978, as amended by the 1996 Act, does not address the scope of rights-of-way or require that such rights-of-way be construed to accommodate compatible uses. Congress can be presumed to have been aware of Section 541(a)(2) of the 1984 Cable Act and yet did not adopt a similar provision in amending the Pole Attachments Act. The FCC cannot do indirectly what Congress expressly declined to do directly. Based on the plain language of the statute, the FCC's conclusion that the statute requires utilities to expand capacity through the exercise of their eminent domain authority violates the intent of Congress and should be reversed.

9. Moreover, the FCC's interpretation with respect to the eminent domain issue is unreasonable and, therefore, impermissible. The FCC's conclusion is based solely on a strained interpretation of Section 224(h). That provision requires notice of intended modifications or alterations to

---

14/ S. Rep. No. 580, 95th Cong., 1st Sess. 16.

15/ Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988); Washington Legal Found. v. United States Sentencing Comm'n, 17 F.3d 1446 (D.C. Cir. 1994).

facilities, not notice of intended expansions of capacity. Any expansion under Section 224(h) stems from the utility's own electric needs, not from any mandatory obligation to make modifications or alterations at the request of a telecommunications carrier or cable television system.

10. The exercise of eminent domain power is a drastic measure which electric utilities use only with abundant caution. Although AT&T asserts that the utilities' concerns may be premature and can be handled on a case-by-case basis, the electric utilities nonetheless object to a requirement that is contrary to law and beyond the scope of the FCC's authority. While the FCC states that it has promulgated this and other requirements in an effort to facilitate arms-length negotiations, rather than having to rely on multiple adjudications in response to complaints,[16/] the Infrastructure Owners submit that if allowed to stand, this requirement will have the opposite effect, as AT&T's Opposition also seems to suggest. The FCC should correct its previous conclusion and rescind any requirement that utilities exercise their state-granted powers of eminent domain on behalf of any non-electric third party.

II. Reconsideration Is Mandated Because the Commission's Decision Is Arbitrary and Capricious

A. The FCC Did Not Follow APA Procedures in Promulgating the Forty-Five Day Access Rule

11. Contrary to the Infrastructure Owners's contention,[17/] AT&T and NCTA assert that the FCC followed the Administrative

---

16/ First R&O, ¶ 1159.

17/ Infrastructure Owners's Petition at 21-26.

Procedure Act ("APA") in promulgating the 45-day access rule.[18] Continental Cablevision et al. simply asserts that the utilities' request for more than 45 days to respond to access requests is inconsistent with modern industry practice and, therefore, is unreasonable.[19] Continental Cablevision's argument is unpersuasive; clearly, a large number of utilities disagree with its notion of the "modern industry practice." AT&T's and NCTA's arguments are equally without merit.

12. In promulgating new rules, an agency must articulate a "rational connection between the facts found and the choice made"[20] and "must cogently explain why it has exercised its discretion in a given manner."[21] The Commission failed to articulate any basis -- reasoned or otherwise -- for the 45 day requirement. Nowhere in the Commission's First R&O does the Commission explain how it devised the 45-day access rule, contrary to the assertions of AT&T and NCTA.[22] In its sole reference to the requirement, the Commission merely states that

---

[18] AT&T Opposition at 40; NCTA Opposition at 30.

[19] Continental Cablevision et al. Opposition at 13.

[20] City of Brookings Mun. Tel. Co. v. Federal Communications Comm'n, 822 F.2d 1153, 1165 (D.C. Cir. 1987) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

[21] Motor Vehicle Ass'n v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 48-49 (1983) (citing Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade, 412 U.S. 397, 416 (1967)).

[22] AT&T contends that the FCC discussed the 45 day access requirement in ¶s 1224-1225 of the First R&O. NCTA cites to ¶ 1225 as containing the FCC's discussion of the 45 day access rule.

"[i]f access is not granted within 45 days of the request, the utility must confirm the denial in writing by the 45th day."[23/] Clearly, this passing reference does not provide an explanation of the Commission's decision to impose a 45 day access requirement, as opposed to a 60, 90, or 120 day requirement. The APA requires the agency to supply a reasoned basis for why it adopts a certain rule.[24/] The FCC failed to do so. Hence, the requirement must be rescinded.[25/]

B. The Rule Permitting Non-Electric Personnel to Work in Proximity to Electric Lines Is Unreasonable

13. MCI, AT&T and NCTA oppose the Infrastructure Owners' position[26/] that the rule allowing non-electric utility personnel to work in proximity to electric lines is not supported by a reasoned basis in the record. They generally argue that the Commission has adequately protected electric utilities in allowing access to their facilities because the Commission specified that any worker seeking access must have sufficient qualifications and training.[27/]

[23/] First R&O, ¶ 1224.

[24/] Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1049 (7th Cir. 1994).

[25/] The Infrastructure Owners also assert that the Commission's 45-day access requirement is not a "logical outgrowth" out of its original NPRM. See Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 549 (D.C. Cir. 1983). While an agency's notice need not identify every precise proposal that the agency may finally adopt, here the FCC impermissibly adopted the 45-day access rule without having discussed this contemplated rule anywhere.

[26/] Infrastructure Owners's Petition at 29-31.

[27/] AT&T Opposition at 39; MCI Opposition at 37; NCTA Opposition at 33.

14. None of these parties addressed the Infrastructure Owners' argument that the Commission failed to consider the dangers associated with working in close proximity to electric lines versus working in close proximity to telecommunications facilities. In addition, none of these parties addressed the Commission's failure to consider how its uniform rule would apply to the different types of electric utility infrastructure. For example, it is much more dangerous to work in close proximity to electric lines in a conduit system than on a pole because in a conduit system workers are forced to work in extremely close physical proximity to high voltage electrical wire, usually less than two feet away from an energized conductor. In contrast, because the communications space is below the electric space on a pole, telecommunications personnel usually do not come closer than ten feet away from an energized conductor when working on a pole. Because it has not sufficiently considered the application of its rule, the Commission must reverse or modify this rule.

III. The FCC's Interpretation Is Impermissible Because it Violates Congressional Intent

A. Wireless Facilities Are Not Covered by the Pole Attachments Act

15. Many parties contend that Section 224(f)(1) mandates access to utility infrastructure to permit siting of wireless facilities.[28/] The Infrastructure Owners disagree.

[28/] See, e.g., Comments of AirTouch Communications on Petitions for Reconsideration ("AirTouch Comments") at 24; AT&T Opposition at 36; Opposition to Petitions for Reconsideration of the Cellular Telecommunications Industry Association ("CTIA Opposition") at 12; Comments on and Opposition to Petitions for Reconsideration and Clarification of Comcast Cellular Communications, Inc. and Vanguard Cellular Systems, Inc.
(continued...)

16. Section 224(f)(1) cannot be read standing alone. Section 224(a)(1) defines a "utility," for purposes of the nondiscriminatory access provisions of Section 224(f)(1), as "any person who is a local exchange carrier or. . . public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." (emphasis added). Congress maintained the "wire communications" language without change from the original version of the Pole Attachments Act.

17. CTIA contends that Section 224(a)(1) serves only to define the entities subject to the nondiscriminatory access requirements under Section 224(f)(1), and is "irrelevant to the issue of whether items other than wire or cables may be attached to the poles of utilities."[29/] CTIA does not address the issue of why Congress sought to extend the nondiscriminatory access requirements only to entities engaged in wire communications. Other parties have failed to address Section 224(a)(1) at all.

18. It is illogical for Congress to have so specifically delimited the scope of entities subject to the pole attachment provisions, as it did in Section 224(a)(1), unless "wire communications" were the object of those provisions. Had Congress intended that Section 224, as amended, would mandate

---

[28/](...continued)
("Comcast Opposition:) at 9; Continental Cablevision et al. Opposition at 12; Opposition and Response of Cox Communications, Inc. to Petitions for Reconsideration ("Cox Opposition") at 9; MCI Response at 40; Comments in Response to Petitions for Reconsideration of Paging Network, Inc. ("Paging Network Comments") at 23; WinStar Communications, Inc. Opposition to Petitions for Reconsideration ("WinStar Opposition") at 12.

[29/] CTIA Opposition at 13.

wireless access, it surely would have expanded "utilities" to encompass public utilities using their poles, ducts, conduits or rights-of-way for wireless communications. Instead, Section 224 establishes a logical symmetry, requiring that utilities whose facilities are used for wire communications provide nondiscriminatory access to telecommunications carriers seeking to attach for that purpose.

B. Section 224(f) Does Not Apply to Transmission Facilities

19. AT&T and Continental Cablevision et al. oppose the Infrastructure Owners's request that the FCC reconsider its decision with respect to transmission facilities.[30/] Their arguments are unconvincing.

20. AT&T asserts that Section 224 mandates access to "any" pole, duct, conduit or right-of-way owned or controlled by the utility.[31/] That is precisely the point. A "transmission tower" is not a "pole, duct, conduit or right-of-way." Based on its plain language, Congress did not name, and thus did not intend to include, transmission facilities in the scope of the infrastructure covered by Section 224(f).

21. Continental Cablevision makes a half-hearted argument in opposition to the exclusion of transmission facilities from the Pole Attachments Act, asserting that access to transmission facilities has never been categorically forbidden under the Pole Attachments Act.[32/] The Infrastructure Owners disagree. For

---

30/ Infrastructure Owners's Petition at 37-40.

31/ AT&T Opposition at 39.

32/ Continental Cablevision et al. Opposition at 10.

approximately the past 18 years, the FCC has interpreted the Pole Attachments Act as applying to distribution facilities only.[33/] This interpretation is consistent with the plain language of the statute and the prevailing understanding within the electric utility, cable and telecommunications industries that the term "poles" means distribution poles only. Congress did not change the language of the statute with its 1996 Act amendments. Accordingly, the Commission should correct its finding on the issue and specifically interpret the Pole Attachments Act to exclude transmission facilities.

C. The Use of Any Single Piece of Infrastructure for Wire Communications Does Not Trigger Access to All Other Infrastructure

22. The Infrastructure Owners dispute the FCC's position, supported in Oppositions in this proceeding,[34/] that a grant of access to part of a utility's infrastructure extends of the requirement of access to the entire infrastructure.[35/] The FCC does not obtain jurisdiction over utility infrastructure except to the extent that it is designated or used, whether it be in whole or in part, for communications purposes. The FCC's and the parties' position is at odds with Congressional intent.

23. Equally flawed is the FCC's position, supported by certain of the parties, that a utility's use of its

---

33/ See, e.g., In the Matter of Capital Cities Cable, Inc. v. Mountain States Tel. and Tel. Co., 56 Rad. Reg. 2d (P&F) 393, 399 n.10 (1984); In the Matter of Logan Cablevision, Inc. v. Chesapeake and Potomac Tel. Co. of West Virginia, 1984 FCC Lexis 2400 (1984).

34/ See AirTouch Comments at 23; AT&T Opposition at 36-37.

35/ Infrastructure Owners's Petition at 40-45.

infrastructure for internal communications purposes subjects it generally to the nondiscriminatory access provisions of the 1996 Act.[36/] This position goes well beyond Congressional intent in enacting the 1996 Act. A utility that is not itself engaged in wire communications, other than for internal communications, is not subject to the access requirements. This is so despite the likelihood that such access would be useful to cable or telecommunications carriers in competing in their respective markets. The FCC's position to the contrary is not supported by the 1996 Act and should be rescinded.

IV. Clarification of the Sixty-Day Advance Notice Requirement Will Avoid Litigation of the Issue

24. Several parties oppose the Infrastructure Owners's request for clarification of the Commission's 60-day notice requirement.[37/] AT&T asserts that the FCC's 60-day notice requirement properly balances the interests of incumbent utilities and competitive LECs.[38/] NCTA asserts that there is no justification for providing less than 60 days' notice of alterations or modification.[39/] Continental Cablevision et al. assert that the 60-day notice period is a common period for joint coordination of projects requiring facilities modification and represents a reasonable compromise.[40/]

36/ See, e.g., AirTouch Comments at 23.

37/ Infrastructure Owners' Petition at 45-48.

38/ AT&T Opposition at 40.

39/ NCTA Opposition at 31.

40/ Continental Cablevision et al. Opposition at 14-15.

25. The Infrastructure Owners do not necessarily disagree. They simply request that the rule be clarified to provide that reasonable efforts to provide 60 days advance notice of non-routine, non-emergency modifications constitute compliance. The Infrastructure Owners's position is an attempt to provide some flexibility to meet a myriad of diverse circumstances, thereby avoiding needless, costly litigation. This position is consistent with the FCC's approach in other areas.[41/]

V. Reconsideration Is Not Warranted Because the FCC's Decision Is Correct

A. The Commission Properly Found that States Need Not Certify that They Regulate Matters of Access

26. NCTA and the California Cable Television Association ("CCTA") urge the FCC to require States to certify that they regulate matters of access. They further assert that the states must regulate access in a manner consistent with the Pole Attachments Act and the FCC's First R&O.[42/] These arguments are wholly without textual basis in the 1996 Act and, as a matter of law, are incorrect: Section 224 does not provide for, nor does the Commission have authority to require, State certification of access matters. Similarly, the FCC has no authority to establish a federal policy on access which the states must follow.

27. Congress has spoken to this precise issue. States need not certify on access matters; to the contrary, such a requirement is conspicuously absent from Section 224, in contrast to the express requirement that States certify that they regulate

---

[41/] See, e.g., First R&O, ¶ 1159.

[42/] NCTA Opposition at 31-32; CCTA Opposition to Petitions for Reconsideration and Clarification ("CCTA Opposition") at 5-6.

the rates, terms and conditions of pole attachments.[43/] The Commission properly followed the plain language of the statute, finding that the amendments to the reverse preemption scheme enacted as part of the 1996 Act do not require the States to certify as to matters of access. The Commission's proper determination should not be disturbed.

28. NCTA and CCTA also assert that the States must regulate access in a manner consistent with the federal law.[44/] However, the FCC has no jurisdiction "in any case where such matters are regulated by a State."[45/] Thus, once a State has preempted the FCC's jurisdiction, the FCC has no further statutory authority to review the State's access rules or regulations to ensure conformity with the federal rules and regulations. The FCC properly found that it has no authority to establish a nationwide policy on access decisions, or to require States that have preempted its jurisdiction on access matters to conform their rules and regulations to the federal law.[46/] NCTA's and CCTA's Oppositions are meritless.

B. Neither the FCC Nor A Party Can Expand the Scope of the Pole Attachments Act to Encompass a Right of Access to Roofs and Risers

29. WinStar reasserts in its Opposition, as it did in its Reconsideration Petition, that "access to roofs and related riser is, by definition, access to the critical right of way for local

---

[43/] 47 U.S.C. § 224(c)(2).

[44/] NCTA Opposition at 32; CCTA Opposition at 6.

[45/] 47 U.S.C. § 224(c)(1).

[46/] First R&O, ¶ 1238.

exchange carriers such as WinStar..."[47] Specifically, WinStar contends that the 1996 Act provides it with a right of access to "utility roofs."[48] WinStar explains that "it is not seeking access to every piece of equipment or real property owned or controlled by the utility," but instead "is seeking access to legitimate rights of way that will be effective in enabling wireless local exchange carriers to expand their local exchange distribution networks."[49]

30. The apparent basis for WinStar's contention that "utility roofs" are rights-of-way under the 1996 Act is that (1) LECs and utilities maintain microwave and wireline networks used for telecommunications purposes, (2) such LECs and utilities are free to site microwave facilities upon their roofs, whether they choose to do so or not,[50] and (3) denying WinStar access to utility roofs would unreasonably restrict its ability to compete with LECs and utilities that have the option of siting wireless facilities on their roofs.[51] In essence, WinStar's reasoning appears to be that, because rooftops might be useful or "effective"[52] to a telecommunications carrier in expanding its

---

[47] WinStar Opposition at 6.

[48] Id. at 7.

[49] Id. at 9.

[50] Id.

[51] WinStar at 7-8.

[52] Id. at 9.

distribution network, rooftops are rights-of-way under Section 224. The FCC properly rejected this position.[53/]

31. Both the plain language and the legislative history of the statute undermine WinStar's position.[54/] The rights conferred by Section 224 extend only to "poles, ducts, conduits and rights of way." The term "rights of way" has historically referred to a right of passage over land owned by another.[55/] Where Congress intended to reach "property," as distinguished from "rights-of-way," it expressly indicated its intention to do so.[56/]

32. Section 224 does not provide for access to a utility's actual or potential "distribution network," as WinStar appears to be contending,[57/] except insofar as the network consists of the listed items. Under WinStar's reasoning, if a utility's property could be used by the utility to site wireless equipment, and if such siting would be "effective in enabling wireless local exchange carriers to expand their local exchange networks,"[58/] that property is a "right of way" for purposes of Section 224.

53/ First R&O, ¶ 1185.

54/ See Infrastructure Owners' Opposition to Petition for Clarification or Reconsideration of WinStar Communications, Inc. at 4-9.

55/ See, e.g., Black's Law Dictionary (Abridged Fifth Edition 1983) at 689: "The term [right of way] sometimes is used to describe a right belonging to a party to pass over land of another . . . ."

56/ See, e.g., Section 704 of the 1996 Act, codified at 47 U.S.C. § 332(c).

57/ WinStar Opposition at 7.

58/ Winstar Opposition at 9.

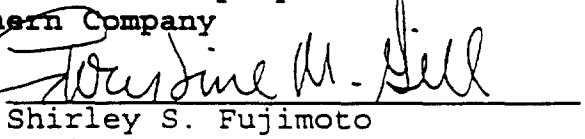
Carried to its logical conclusion, WinStar's argument would permit a telecommunications carrier to site its facilities in the lobby of a utility's headquarters, a location potentially available to the utility, if it would be "effective" to the carrier in expanding its network. Section 224 does not go that far in according access to telecommunications carriers, but instead clearly circumscribes the extent of access. Because WinStar's contrary interpretation of Section 224 constitutes an unwarranted expansion of the rights of access conferred by Congress, it must be rejected.

Conclusion

WHEREFORE, THE PREMISES CONSIDERED, American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Northern States Power Company, and The Southern Company urge the Commission to deny those Oppositions to Petitions for Reconsideration inconsistent with the views expressed herein.

Respectfully submitted,

American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Northern States Power Company and The Southern Company

By: 

Shirley S. Fujimoto
Christine M. Gill
Kris Anne Monteith
McDermott, Will & Emery
1850 K Street, N.W.
Washington, D.C. 20006
(202) 778-8282

Their Attorneys

Dated: November 12, 1996

CERTIFICATE OF SERVICE

I hereby Certify that on this 12th day of November 1996, I caused true and correct copies of the Reply to Oppositions to Petitions for Reconsideration of the First Report and Order of American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Northern States Power Company, and The Southern Company to be served via First-Class Mail postage prepaid on:

Judith St. Ledger-Roty
Paul G. Madison
Reed Smith Shaw & McClay
Suite 1100 - East Tower
1301 K Street, NW
Washington, D.C. 20005

Mark A. Stachiew
Vice President, Senior
Counsel & Secretary
AirTouch Paging
Three Forest Plaza
Suite 800
12221 Merit Drive
Dallas, Texas 75251

Leonard J. Kennedy
Michael D. Hays
Laura H. Phillips
Dow, Lohnes & Albertson, PPLC
Suite 800
1200 New Hampshire Ave., NW
Washington, D.C. 20036

David A. Gross
Kathleen Q. Abernathy
AirTouch Communications, Inc.
Suite 800
1818 N Street, NW
Washington, D.C. 20036

Mark Haddad
David Lawson
Sidley & Austin
1722 Eye Street, NW
Washington, D.C. 20006

Pamela Riley
AirTouch Communications, Inc.
One California Street
San Francisco, CA 94111

Mark C. Rosenblum
Roy E. Hoffinger
Stephen C. Garavito
Richard H. Rubin
Room 3245I1
295 N. Maple Avenue
Basking Ridge, N.J. 07920

Richard J. Metzger
Emily M. Williams
Association for Local
Telecommunications Serv.
Suite 560
1200 19th Street, NW
Washington, D.C. 20036

Carl W. Northrop
Christine M. Crowe
Paul, Hastings, Janofsky
& Walker LLP
10th Floor
1299 Pennsylvania Ave., NW
Washington, D.C. 20004

Anthony C. Epstein
Donald B. Verrilli, Jr.
Maureen F. Del Duca
Jodie L. Kelley
Michelle B. Goodman
Jenner & Block
601 13th Street, NW
Washington, D.C. 20005

Lisa B. Smith
Don Sussman
Larry Fenster
Chris Frentrup
Donna Roberts
MCI Communications Corp.
1801 Pennsylvania Ave., NW
Washington, D.C. 20006

Howard J. Symons
Christopher J. Harvie
Casey B. Anderson
Mintz, Levin, Cohn, Ferris,
Glovsky & Popeo, P.C.
Suite 900
701 Pennsylvania Ave., NW
Washington, D.C. 20004

Jerry Yanowitz
Jeffrey Sinsheimer
California Cable Television
Association
4341 Piedmont Avenue
P.O. Box 11080
Oakland, CA 94611

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
1724 Massachusetts Ave., NW
Washington, D.C. 20036

Paul Glist
John Davidson Thomas
Cole, Raywid & Braverman, LLP
Suite 200
1919 Pennsylvania Ave., NW
Washington, D.C. 20006

Michael F. Altschul
Randall S. Coleman
Andrea D. Williams
Cellular Telecommunications
Industry Association
Suite 200
1250 Connecticut Ave., NW
Washington, D.C. 20036

Philip L. Verveer
Jennifer A. Donaldson
Gunnar D. Halley
Willkie Farr & Gallagher
Suite 600
1155 21st Street, NW
Three Lafayette Centre
Washington, D.C. 20036-3384

Teresa Marrero
Senior Regulatory Counsel
Teleport Comm. Group Inc.
Two Teleport Drive
Staten Island, NY 10311

Werner K. Hartenberger
Laura H. Phillips
J.G. Harrington
Dow, Lohnes & Albertson, PLLC
Suite 800
1200 New Hampshire Ave., NW
Washington, D.C. 20036

Timothy R. Graham
Robert G. Berger
Joseph Sandri
WinStar Communications, Inc.
1146 19th Street, NW
Washington, D.C. 20036

Kris A Monteith
Kris Anne Monteith